No. ____

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IN THE

Supreme Court of the United States

HENRY C. YUEN and ELSIE M. LEUNG,

Petitioners,

—v.—

SECURITIES AND EXCHANGE COMMISSION and GEMSTAR-TV GUIDE INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 1103 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 78u-3(c)(3), is properly construed to empower a district court—upon application of the Securities and Exchange Commission prior to the commencement of any civil enforcement action—to freeze contractually guaranteed payments about to be made to corporate executives for unpaid salary, bonuses, severance and vacation pay as "extraordinary payments," without requiring any showing that the payments were improperly obtained, illegitimate or excessive in comparison to payments made by comparable companies to similarly situated executives.

2. Whether, by permitting a pre-complaint seizure of assets by the SEC without requiring a showing of probable cause, or even reasonable suspicion, to believe that wrongdoing has been committed by the owner of the seized assets and a nexus between the seized assets and the wrongdoing, Section 1103 violates the Fourth Amendment.

3. Whether Section 1103 is void for vagueness as applied because the SEC misled Petitioners as to its intent to apply the statute to the payments to be made to Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and *en banc* opinion of the United States Court of Appeals for the Ninth Circuit entered on March 22, 2005, which affirmed an escrow order issued pursuant to Section 1103 of the Sarbanes-Oxley Act of 2002 freezing monies due to Petitioners.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported at *SEC* v. *Gemstar-TV Guide International, Inc.*, 401 F.3d 1031 (9th Cir. 2005), and is reproduced in the Appendix hereto at pp. 68a-123a.

The panel opinion of the Ninth Circuit, which reversed the District Court's grant of an escrow order, and which in turn was reversed by the *en banc* opinion, is reported at *SEC* v. *Gemstar-TV Guide International, Inc.*, 367 F.3d 1087 (9th Cir. 2004), and is reproduced in the Appendix hereto at pp. 23a-67a.

The District Court's opinion, granting the SEC application for an escrow order, was filed on June 20, 2003, in *SEC* v. *Gemstar-TV Guide International, Inc.*, Docket No. CV 03-03124, U.S. District Court, Central District of California, and is not reported. This opinion is reproduced in the Appendix hereto at pp. 1a-22a.

JURISDICTIONAL STATEMENT

Petitioners request that this Court review the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit entered March 22, 2005, affirming the asset freeze issued pursuant to Section 1103 of the Sarbanes-Oxley Act of 2002. This petition for certiorari is being filed within 90 days of entry of the order for which review is sought, as is required by Supreme Court Rule 13. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1103 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 78u-3(c)(3), provides:

> (3) TEMPORARY FREEZE
>
> (A) In General
>
> (i) Issuance of temporary order
>
> Whenever, during the course of a lawful investigation involving possible violations of the Federal securities laws by an issuer of publicly traded securities or any of its directors, officers, partners, controlling persons, agents, or employees, it shall appear to the Commission that it is likely that the issuer will make extraordinary payments (whether compensation or otherwise) to any of the foregoing persons, the Commission may petition a Federal district court for a temporary order requiring the issuer to escrow, subject to court

supervision, those payments in an interest-bearing account for 45 days.

(ii) Standard

A temporary order shall be entered under clause (i), only after notice and opportunity for a hearing, unless the court determines that notice and hearing prior to entry of the order would be impracticable or contrary to the public interest.

(iii) Effective period

A temporary order issued under clause (i) shall—

(I) become effective immediately;

(II) be served upon the parties subject to it; and

(III) unless set aside, limited or suspended by a court of competent jurisdiction, shall remain effective and enforceable for 45 days.

(iv) Extensions authorized

The effective period of an order under this subparagraph may be extended by the court upon good cause shown for not longer than 45 additional days, provided that the combined period of the order shall not exceed 90 days.

(B) Process on Determination of Violations

(i) Violations charged

If the issuer or other person described in subparagraph (A) is charged with

any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the order shall remain in effect, subject to court approval, until the conclusion of any legal proceedings related thereto, and the affected issuer or other person, shall have the right to petition the court for review of the order.

(ii) Violations not charged

If the issuer or other person described in subparagraph (A) is not charged with any violation of the Federal securities laws before the expiration of the effective period of a temporary order under subparagraph (A) (including any applicable extension period), the escrow shall terminate at the expiration of the 45-day effective period (or the expiration of any extension period, as applicable), and the disputed payments (with accrued interest) shall be returned to the issuer or other affected person.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves another effort by the government to distort a statute beyond its intended and logical scope in order to achieve a politically popular result. In the case below, the SEC invoked Section 1103 of the Sarbanes Oxley Act of 2002—a statute that permits the SEC, during the course of an investigation, to freeze "extraordinary payments" about to be made to corporate officers—to temporarily freeze approximately thirty-eight million dollars due to Petitioners Henry C. Yuen and Elsie M. Leung. The SEC claimed that it needed a temporary freeze of these funds while it investigated the Petitioners. Yet, over two years later, and as the result of a plainly erroneous and unfair interpretation of the statute by the Ninth Circuit, Petitioners' funds remain frozen despite the SEC's total failure to show that the payments were "extraordinary" in any respect or that they were improperly obtained. Moreover, the SEC enforced Sec-